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Nos. A09-1776 & A09-1778

State of Minnesota
In Supreme Court

In re Individual 35W Bridge Litigation

BRIEF OF RESPONDENT/CROSS-APPELLANT JACOBS ENGINEERING GROUP INC.

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Table of Contents

Page

Table of Authorities iii

Statement of Legal Issues 1

Statement of the Case 2

Statement of Facts 4

Summary of Argument 6

Argument 9

I. Standard of Review 9

II. URS Cannot Recover Any Contribution from Jacobs Because Under Long-Settled Common Law Principles, Jacobs Has No Common Liability with URS to the Plaintiffs. 10

A. Common Liability Is an Essential Element of a Contribution Claim. 12

B. This Court's Precedents Recognizing that Common Liability Can Be Predicated on Defendants' Liability to a Plaintiff on Different Legal Theories Have Not Eliminated the Requirement. 16

C. The Court of Appeals Applied the Correct Standard and Law in Holding that URS's Contribution Claim Against Jacobs Should Be Dismissed Because of the Absence of Common Liability. 22

D. URS's Contribution Claim Should Not Be Treated as One for Indemnity. 26

E. No Equitable Grounds Support Disregarding Settled Precedent to Allow URS's Contribution Claim. 27

III. The 2007 Amendments to Minn. Stat. § 541.051 Do Not Allow URS to Recover Any Contribution from Jacobs. 29

A. The Repose Provision In Effect Prior to the 2007 Amendments Expressly Extinguished Any Contribution Claims Against Jacobs. 29

B. The 2007 Amendments Do Not Apply Because Any Claims Against Jacobs Were Extinguished Prior to the June 30, 2006, Effective Date of the Amendments. 30

C. Even if Applicable to this Case, the 2007 Amendments to Minn. Stat. § 541.051 Did Not Change or Eliminate the Common Liability Requirement. 39

IV. Interpreting the 2007 Amendments to Minn. Stat. § 541.051 to Allow URS's Contribution Claim Against Jacobs Would Violate Jacobs' Constitutional Due Process Rights. 43

A. A Statute of Repose Creates a Substantive Limit on Liability and a Right of Certainty and Finality in Immunity from Suit. 43

B. Jacobs Acquired under Minn. Stat. § 541.051 a Vested Right of Immunity from Suit and Liability, Entitled to Due Process Protection. 47

Conclusion 53

Table of Authorities

Page

CASES

Am. Auto Ins. Co. v. Molling, 239 Minn. 74, 57 N.W.2d 847 (1953) 6, 12, 21, 23

Amaral v. St. Cloud Hosp., 598 N.W.2d 379 (Minn. 1999) 34

Ascheman v. Village of Hancock, 254 N.W.2d 382 (Minn. 1977) 21, 23

Bodah v. Lakeville Motor Express, Inc., 663 N.W.2d 550 (Minn. 2003) 9

Bunge v. Yager, 236 Minn. 245, 52 N.W.2d 446 (1952) 13

Camacho v. Todd & Leiser Homes, 706 N.W.2d 49 (Minn. 2005) 2, 37, 46

Canosia Tp. v. Grand Lake Tp., 80 Minn. 357, 83 N.W. 346 (1900) 13

Cargill, Inc. v. Ace Am. Ins. Co., 784 N.W.2d 341 (Minn. 2010) 13

Chase Secs. Corp. v. Donaldson, 325 U.S. 304 (1945) 46

City of Cedar Falls v. Cedar Falls Cmty. Sch. Dist., 617 N.W.2d 11 (Iowa 2000) 43

City of Willmar v. Short-Elliott-Hendrickson, Inc., 512 N.W.2d 872 (Minn. 1994) 10, 18, 45

Conde v. City of Spring Lake Park, 290 N.W.2d 164 (Minn. 1980) 1, 20, 21, 22, 23

Donaldson v. Chase Sec. Corp., 216 Minn. 269, 13 N.W.2d 1 (1943) 45, 46

Estate of Ryan v. Heritage Trails Assocs., Inc., 745 N.W.2d 724 (Iowa 2008) 41, 42

Farber v. Lok-N-Logs, Inc., 701 N.W.2d 368 (Neb. 2005) 51

Galbraith Eng'g Consultants, Inc. v. Pochucha, 290 S.W.3d 863 (Tex. 2009) 51

Genin v. 1996 Mercury Marquis, 622 N.W.2d 114 (Minn. 2001) 34

Gomon v. Northland Family Physicians, Ltd., 645 N.W.2d 413 (Minn. 2002) 32, 46

Guessefeldt v. McGrath, 342 U.S. 308, 310 (1952) 9

Halverson v. Rolvaag, 274 Minn. 273, 143 N.W.2d 239 (1966) 48

Hammerschmidt v. Moore, 274 N.W.2d 79 (Minn. 1978) 13

Hart v. Cessna Aircraft Co., 276 N.W.2d 166 (Minn. 1979) 1, 13, 14

Hendrickson v. Minn. Power & Light Co., 258 Minn. 368, 104 N.W.2d 843 (1960) 17, 26

Horton v. Orbeth, Inc., 342 N.W.2d 112 (Minn. 1984) ..... *passim*

Hunt v. Nev. State Bank, 285 Minn. 77, 172 N.W.2d 292 (Minn. 1969) 9

In re Individual 35W Bridge Litig., 787 N.W.2d 643, 651 n.6
(Minn. Ct. App.) *rev. granted*, Minn. Nov. 16 2010 ..... 31, 33, 43, 44

Indep. Sch. Dist. No. 197 v. W.R. Grace & Co., 752 F. Supp. 286 (D. Minn. 1990) 52

Jones v. Fisher, 309 N.W.2d 726 (Minn. 1981) ..... *passim*

Kratzer v. Welsh Cos., LLC, 771 N.W.2d 14 (Minn. 2009) 33

Lambertson v. Cincinnati Corp., 312 Minn. 114, 257 N.W.2d 679 (1977) 7, 16, 17, 18, 21, 24

Larson v. Babcock & Wilcox, 525 N.W.2d 589 (Minn. Ct. App. 1994) 52

Lemmer v. IDS Props., Inc., 304 N.W.2d 864 (Minn. 1980) 13

Martens v. Minn. Mining. & Mfg. Co., 616 N.W.2d 732 (Minn. 2000) 9

McIntosh v. Melroe Co., 729 N.E.2d 972 (Ind. 2000) 37, 38

Moorhead Econ. Dev. Auth. v. Anda, 789 N.W.2d 860 (Minn. 2010) 19, 20

Nelson v. Larsen, 405 N.W.2d 455 (Minn. Ct. App. 1987) 21

Parten v. First Nat. Bank & Trust Co., 204 Minn. 200, 283 N.W. 408 (1939) 13

Pautz v. Cal-Ros, Inc., 340 N.W.2d 338 (Minn. 1983) 13, 21, 25

Peterson v. City of Minneapolis, 285 Minn. 282, 173 N.W.2d 353 (1969) ..... *passim*

Peterson v. Little-Giant Glencoe Portable Elevator Div. of Dynamics Corp. of Am., 366 N.W.2d 111 (Minn. 1985) 16, 17, 18

Renner v. Model Laundry, Cleaning & Dyeing Co., 184 N.W. 611 (Iowa 1921) 42

Reserve Ins. Co. v. Village of Big Lake, 304 Minn. 148, 230 N.W.2d 47 (1975) 13

Ripley v. Tolbert, 921 P.2d 1210 (Kan. 1996) 51

Roemhildt v. Gresser Cos., Inc., 729 N.W.2d 289 (Minn. 2007) 13

Sartori v. Harnischfeger Corp., 432 N.W.2d 448 (Minn. 1988) 2, 50

Sch. Bd. of Norfolk v. U.S. Gypsum Co., 360 S.E.2d 325 (Va. 1987) 51

Shadburn-Vinton v. Dalkon Shield Claimants Trust, 60 F.3d 1071 (4th Cir. 1995) 52

Spitzack v. Schumacher, 308 Minn. 143, 241 N.W.2d 641 (1976) ..... *passim*

State ex rel. Palmer v. Unisys Corp., 637 N.W.2d 142 (Iowa 2001) 43

State v. Jackson, 742 N.W.2d 163 (Minn. 2007) 39

Tolbert v. Gerber Indus., Inc., 255 N.W.2d 362 (Minn. 1977) 10, 26

U.S. Home Corp. v. Zimmerman Stucco & Plaster, Inc., 749 N.W.2d 98 (Minn. Ct. App.), *rev. denied*, Minn. Aug. 5, 2008 44

Vesely, Otto, Miller & Keefe v. Blake, 311 N.W.2d 3 (Minn. 1981) 25, 26

Waldref v. Dow, 172 Minn. 52, 214 N.W. 767 (1927) 13

Weston v. McWilliams & Assocs., Inc., 716 N.W.2d 634 (Minn. 2006) ..... *passim*

Wesley Theological Seminary of the United Methodist Church v. U.S. Gypsum Co., 876 F.2d 119 (D.C. Cir. 1989) 52

White v. Johnson, 272 Minn. 363, 137 N.W.2d 674 (1965) 12, 23, 24

Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800 (1957) 14, 46, 48

Woodhall v. State, 738 N.W.2d 357 (Minn. 2007) 53

CONSTITUTIONS, STATUTES AND RULES

U.S. Const., amend. XIV, § 1 ..... 2, 43

U.S. Const. art. I § 7 43

Minn. Const., art. I, § 7 ..... 2, 43

Minn. Stat. § 541.051 ..... *passim*

Minn. Stat. § 604.01 29

Minn. Stat. § 604.02 ..... 27, 29

Minn. Stat. § 645.16 ..... 34, 36

Minn. Stat. § 645.17 38

Iowa Code § 614.1 41

2007 Minn. Laws, ch. 105, § 4 ..... 1, 6, 31, 33

2007 Minn. Laws, ch. 140, art. 8, § 29 ..... 1, 6, 31, 33

Minn. R. Civ. P. 8.03 20

OTHER AUTHORITIES

51 Am. Jur. 2d *Limitation of Actions* § 18 (2000) 37, 46

54 C.J.S. *Limitations of Actions*, § 5 (2005) 37, 46

Michael Steenson, *Joint and Several Liability in Minnesota: The 2003 Model*, 30 Wm. Mitchell L. Rev. 845, 884-85 (2004) 27, 28

Michael J. Vardaro & Jennifer E. Waggoner, Note, Statutes of Repose—*The Design Professional's Defense to Perpetual Liability*, 10 St. John's J. Legal Comment. 697, 713 (1995) 38

Statement of Legal Issues

1. Is Jacobs Engineering Group Inc. ("Jacobs") entitled to dismissal of URS Corporation's ("URS") contribution claim against it on the ground that, under the repose provision of Minn. Stat. § 541.051, Jacobs has no common liability with URS to the plaintiffs?

The district court held that Jacobs was not entitled to dismissal of URS's claim on this ground, and the court of appeals reversed.

Apposite Authorities

Minn. Stat. § 541.051

Jones v. Fisher, 309 N.W.2d 726 (Minn. 1981)
Conde v. City of Spring Lake Park, 290 N.W.2d 164, 166 (Minn. 1980)
Hart v. Cessna Aircraft Co., 276 N.W.2d 166 (Minn. 1979)
Spitzack v. Schumacher, 308 Minn. 143, 241 N.W.2d 641 (1976)

2. Is Jacobs also entitled to dismissal of URS's contribution claim on the ground that any such contribution claim had been extinguished prior to the June 30, 2006, retroactive effective date of the 2007 amendments to Minn. Stat. § 541.051, so that the amendments do not apply to allow URS's claim?

The district court held that Jacobs was not entitled to dismissal on this ground, and the court of appeals held that the requirement of common liability was not excused by the 2007 amendments to § 541.051.

Apposite Authorities

Minn. Stat. § 541.051
2007 Minn. Laws, ch. 105, § 4
2007 Minn. Laws, ch. 140, art. 8, § 29

Weston v. McWilliams & Assocs., Inc., 716 N.W.2d 634 (Minn. 2006)
Sartori v. Harnischfeger Corp., 432 N.W.2d 448 (Minn. 1988)

3. Is Jacobs entitled to dismissal of URS's contribution claim on the ground that if the 2007 amendments are interpreted to allow URS's claim, then Jacobs has been deprived of constitutional due process and a vested right of repose in violation of the United States and Minnesota Constitutions?

The district could held Jacobs was not entitled to dismissal on this ground, and the court of appeals did not reach the issue in its opinion in this case as it was unnecessary to do so because of its ruling with respect to the first two issues.

Apposite Authorities

U.S Const., amend. XIV, § 1
Minn. Const., art. I, § 7
Minn. Stat. § 541.051

Weston v. McWilliams & Assocs., Inc., 716 N.W.2d 634 (Minn. 2006)
Camacho v. Todd & Leiser Homes, 706 N.W.2d 49 (Minn. 2005)
Peterson v. City of Minneapolis, 285 Minn. 282, 288, 173 N.W.2d 353, 357 (1969)

The first of the above issues was identified in the URS petition for further review. The second issue was raised in the URS petition to the extent that URS contends that the 2007 amendments to § 541.051 eliminated the requirement of common liability for URS's contribution claim. Jacobs identified issues two and three above in its response to the petition and conditional petition for cross-review. This Court granted review of all three issues in its order dated November 16, 2010.

Statement of the Case

Plaintiffs in these cases commenced separate actions for damages arising out of the collapse on August 1, 2007, of the I-35W Bridge ("Bridge") in Minneapolis. They sued

defendants URS Corporation ("URS") and Progressive Contractors, Inc. ("PCI"). In partial response, both URS and PCI commenced third-party contribution and indemnity actions against Jacobs Engineering Group Inc. ("Jacobs") for design work performed in connection with the original construction of the Bridge in the 1960s by Sverdrup & Parcel and Associates, Inc. ("S&P"), which was acquired by Jacobs in 1999. Because of the repose bar, none of the plaintiffs in this litigation sued Jacobs.

Jacobs filed a Rule 12 motion to dismiss the claims of both URS and PCI on the grounds that the repose provisions of Minn. Stat. § 541.051 precluded any liability of Jacobs because (1) Jacobs had no common liability with URS and PCI to the plaintiffs because the repose statute had eliminated—even before they accrued—any claims by plaintiffs against Jacobs; and (2) the repose statute also had expressly extinguished any contribution or indemnity claims against Jacobs. Jacobs also argued that certain amendments to the repose statute passed in 2007, and made retroactively effective to June 30, 2006, did not apply to claims against Jacobs that had been extinguished prior to the retroactive effective date, and that if they did so apply, then the amendments violated the constitutional due process rights of Jacobs by depriving it of its vested right of repose.

The district court judge, to whom all of the cases were assigned, Judge Deborah Hedlund, denied the motion in an order dated August 28, 2009. *Add.1-9.* Jacobs timely filed appeals of right and, in the alternative, petitions for discretionary review. The court of appeals allowed the appeals of right and dismissed as moot the petitions for discretionary review. *A.134-137.* PCI later settled out of the case entirely and so its claims were not at issue on the appeal. The State of Minnesota ("State"), which has at all times owned the

Bridge, also brought claims against Jacobs, URS, and PCI. The State has settled its claims with URS and PCI, and its claims against Jacobs are the subject of a related appeal (Nos. A10-87; A10-89; A10-90; and A10-91).

The court of appeals filed its opinion on August 24, 2010, reversing the district court and holding that Jacobs was entitled to dismissal of URS's claims because Jacobs had no common liability with URS to the plaintiffs, and under well-settled Minnesota law, the absence of common liability precluded any contribution recovery by URS. *Add.10-29.* URS had no other claims against Jacobs, as its "indemnity" claim was in reality a contribution claim, (*Add.28)*, so the court of appeals held that Jacobs was entitled to dismissal. *Add.29.* On November 16, 2010, this Court granted URS's petition for further review, and also granted Jacobs' conditional request for review of the issues that the court of appeals did not address (because it was unnecessary to do so) in its opinion in this case.

Statement of Facts

Jacobs brought a Rule 12.02(e) motion to dismiss for failure to state a claim soon after URS and PCI commenced their third-party claims against Jacobs. The "facts," when such a motion is brought, are the allegations in the complaint or third-party complaint, which are assumed to be true for the purpose of deciding the motion. The facts material to Jacobs' motion and this appeal are very few. URS's claim against Jacobs arises solely out of design services furnished by S&P for the original construction of the Bridge pursuant to a 1962 contract between S&P and the State, which has at all times been the owner of the Bridge. *A.139.* Substantial completion of construction of the Bridge occurred in 1967. *A.139.* S& P's work on the Bridge ended on or before the substantial completion of the

Bridge in 1967. *A.139.* Jacobs acquired Sverdrup in 1999. The Bridge collapsed on August 1, 2007. *A.141.*

Plaintiffs, those injured and the lawful heirs of those killed as a result of the collapse of the Bridge, commenced actions for their injuries and damages against URS and now-settled PCI, which both then asserted third-party claims against Jacobs based on the design services furnished by S&P in the 1960s. *A30.* None of the plaintiffs asserted claims against Jacobs. URS performed consulting services on the Bridge during the period from 2003 to the date of the collapse. *A.1.* PCI is a road construction contractor that was performing work on the Bridge at the time of the collapse. *A.2.*

In September 2010, URS settled all the plaintiffs' claims against it for a sum exceeding $50 million. *A.159-60.* Although there has been no trial, and URS has not been adjudged to be jointly liable with any other party to plaintiffs, the terms of URS's settlement purport that "URS could be paying more than its fair share of the Plaintiffs' damages," and include a provision releasing all of the plaintiffs' claims arising from the Bridge collapse against URS and "all other persons, parties, or entities." *A.161-62.*

The only other relevant facts relate to Minnesota's statute of repose for improvements to real property, Minn. Stat. § 541.051, and the terms and effective date of 2007 amendments to the statute. The first version of the statute was enacted in 1965, and at different times it has provided for either a ten- or fifteen-year repose period. Until the 2007 amendments, the repose period applied equally to direct claims and to claims for contribution or indemnity. The 2007 amendments, which were made effective retroactive "to" and "from" June 30, 2006, (in two alternate versions of the legislation) eliminated the

repose provision for contribution and indemnity claims and changed the definition of when a contribution or indemnity claim "accrues." 2007 Minn. Laws, ch. 105, § 4; 2007 Minn. Laws, ch. 140, art. 8, § 29.

Summary of Argument

The court of appeals applied venerable and settled principles of common law in holding that Jacobs is entitled to dismissal of URS's contribution claim because Jacobs has no common liability with URS to the plaintiffs. There is no good reason for this Court to disturb or overrule its longstanding precedents requiring common liability as a prerequisite to a viable contribution claim. The absence of common liability in this case arises because Jacobs has not at any time had liability of any kind to the plaintiffs for the damages they sustained as a result of the collapse of the Bridge on August 1, 2007. The reason is that decades before that date, the repose provision of Minn. Stat. § 541.051 extinguished any causes of action plaintiffs might have had against Jacobs—eliminating all potential liability even before a cause of action could accrue.

URS distorts and sometimes ignores altogether the principles that this Court's decisions on common liability have established. A half-century ago, this Court recognized that common liability is the "very essence of contribution." *Am. Auto. Ins. Co. v. Molling*, 239 Minn. 74, 76, 57 N.W.2d 847, 849 (Minn. 1953). The cases repeatedly make clear that common liability exists or not "the instant the tort is committed" and that after-acquired defenses, like those based on a statute of limitations, covenant not to sue, or failure to give notice of claim, do not defeat common liability. *Spitzack v. Schumacher*, 308 Minn. 143, 145, 241 N.W.2d 641, 643 (1976). These "procedural" or "technical" defenses are

consequentially different from one—like the statute of repose—that is a substantive limitation preventing a cause of action from ever accruing. *See Weston v. McWilliams & Assocs.*, 716 N.W.2d 634, 641 (Minn. 2006). URS disregards this important distinction when it argues that Jacobs' statute of repose defense no more destroys common liability than one based on a statute of limitations or other procedural defense.

A statute of repose prevents common liability from arising on the same basis that certain other defenses do—by eliminating the substance of any cognizable legal theory of recovery by the plaintiff. Because of the operation of the comparative fault statute, a defendant whose negligence is less than the negligence of the plaintiff has no liability to the plaintiff and can have no common liability with another. A dram shop vendor has no common liability with an intoxicated driver whose injuries cause financial loss to his family because the driver is not liable for his injuries to his family. Similarly, when the doctrine of intra-family tort immunity applied, a spouse or parent could not be commonly liable with another for injuries to the other spouse or one of their children. In each of these instances—including with respect to the statute of repose—the salient point of the defense is that the substantive law does support any theory of liability to the plaintiff, so common liability cannot exist. For that reason, the defense is one that is based "on the merits." Moreover, in none of these scenarios has this Court made an exception to the requirement of common liability for the sake of "equity" or "fairness."

Common liability can exist where defendants each have liability to a plaintiff, albeit on different legal theories, as where one might be liable in tort and another under the workers' compensation statutes, *Lambertson v. Cincinnati Corp.*, 312 Minn. 114, 257 N.W.2d

679 (1977), or where one is liable under the dram shop laws and another under the Wrongful Death Act, *Jones v. Fisher*, 309 N.W.2d 726 (Minn. 1981). URS cites to these and similar precedents as if they support its position that common liability exists in this case or is not required. They certainly do not, and the reason is due to the simple and undisputed fact that Jacobs has never had liability to the plaintiffs on any theory.

URS argues alternatively that the 2007 amendments to Minn. Stat. § 541.051 eliminated the requirement of common liability for contribution claims. The argument has no merit, first because the amendments do not apply to claims extinguished prior to their effective date, and second because the amendments addressed only the time when a contribution and indemnity claim accrued and could be timely asserted and did nothing to change the elements of recoverable contribution claim, including the requirement of common liability.

The absence of common liability is a sufficient reason, by itself, to affirm the decision of the court of appeals. In addition, however, the decision can also be affirmed on other grounds. The applicable version of § 541.041 extinguished both direct claims and any contribution or indemnity claims against Jacobs arising out of the collapse of the Bridge. So just as any direct claims by plaintiffs were undisputedly extinguished decades before they even accrued, so too did the same repose provision eliminate any contribution liability of Jacobs to URS.

Finally, while the decision of the court of appeals can and should be affirmed on common law and statutory grounds, if it is not, then this Court should order dismissal of URS's contribution claim on constitutional due process grounds. Jacobs acquired a right to

immunity from suit and liability by operation of the repose provision of § 541.051 long before URS could acquire a contribution or any other claim against Jacobs. The right of immunity vested when the repose period expired, as it depended on no other contingency. To deprive Jacobs of that right through retroactive application of a statute would violate its due process rights under the United States and Minnesota Constitutions and would be inconsistent with this Court's precedents on vested rights.

Argument

I. Standard of Review

This appeal raises only questions of law presented to the trial court on a motion to dismiss. In reviewing a decision involving a motion to dismiss based on failure to state a claim upon which relief can be granted under Rule 12.02(e), the appellate court undertakes *de novo* review to determine the legal issue of whether the complaint sets forth a legally sufficient claim for relief. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003) (citation omitted). Rule 12.02 is modeled on Federal Rule of Civil Procedure 12(b). *See Hunt v. Nev. State Bank*, 285 Minn. 77, 82, 172 N.W.2d 292, 296 (Minn. 1969). The reason for evaluating motions brought under the rule by accepting the allegations of the complaint as true is to test the legal sufficiency of the claim for which dismissal is sought. *See, e.g.*, *Guessefeldt v. McGrath*, 342 U.S. 308, 310 (1952); *see also Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 740 n. 9 (Minn. 2000) ("because we assume the allegations of the complaint are true for Rule 12.02(e) purposes, our only concern is whether as a *matter of law* the allegations" state a claim on which relief can be granted) (emphasis added).

Even assuming as true all of URS's allegations about its own faultlessness and the

negligence and causal responsibility of S&P for the Bridge collapse, URS does not have a viable contribution claim against Jacobs. Failing to establish the legal sufficiency for its claim, URS asserts "equitable" grounds for ignoring or overturning settled principles. Neither Rule 12 nor any canon for evaluating a motion under the rule requires or justifies assuming the truth of purported equities that a party puts forth to avoid dismissal under the rule. As explained below, moreover, there is nothing unfair or inequitable about the result to which Jacobs is legally entitled.

II. URS Cannot Recover Any Contribution from Jacobs Because Under Long-Settled Common Law Principles, Jacobs Has No Common Liability with URS to the Plaintiffs.

URS's only claim against Jacobs is one for contribution based on comparative fault principles.[1] Contribution is a common law tort remedy, and this Court's longstanding precedents have clearly defined its contours. An essential element of a contribution claim is that the defendants between whom contribution is sought must have common liability to the plaintiff at the instant the tort, *i.e.*, injury, occurs. As is discussed below, *all* of this Court's precedents have been consistent with the requirement of common liability. The only significant modification to the principle over the years has been the recognition that common liability can encompass liability of defendants to a plaintiff on different legal theories. That circumstance has no application here because it is undisputed that Jacobs has

[1] In the district court and court of appeals, URS contended that it also had an independent claim for indemnity against Jacobs. *A.2.* It has since then abandoned that position—and for good reason—because it is untenable under this Court's precedents, beginning with *Tolbert v. Gerber Indus., Inc.*, 255 N.W.2d 362, 367-68 (Minn. 1977). *See also, e.g.*, *City of Willmar v. Short-Elliott-Hendrickson, Inc.*, 512 N.W.2d 872, 874, 876 (Minn. 1994).

no liability to the plaintiffs on any legal theory due to the repose provision of Minn. Stat. § 541.051.[2]

The allegations against Jacobs all relate to design services furnished by S&P for the original construction of the Bridge, which was substantially complete in 1967. The repose provision of Minn. Stat. § 541.051 has at all material times provided that "no action . . . to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property could be brought nor could accrue" a specified number of years after substantial completion of construction of the improvement. The prescribed repose period has sometimes been fifteen, and at other times, ten years. In either case, it is undisputed that the repose provision extinguished any claims of the plaintiffs against Jacobs long before the collapse of the Bridge on August 1, 2007, the earliest those claims could have otherwise accrued. Accordingly, Jacobs has no liability to plaintiffs, and for that reason it can have no common liability with URS to plaintiffs.[3]

URS seeks for itself an exception in this case to the requirement of common liability for a contribution recovery, and even goes so far as to suggest that the requirement should be eliminated. It has not furnished any persuasive reason consistent with this Court's

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[2] As URS notes, none of the plaintiffs brought suit against Jacobs. URS Br. at 8.

[3] While URS contends—and Jacobs disputes, *see* discussion below at 29-39—that the 2007 amendments to Minn. Stat. § 541.051 relating to contribution and indemnity claims permit it to recover in contribution from Jacobs, there is agreement that the amendments did nothing to alter the repose period for the direct claims of plaintiffs. URS also argues that the amendments eliminated the "common liability" requirement for contribution claims, an erroneous position that is discussed in the separate argument below regarding the amendments. *See* discussion below at 39-43.

precedents for receiving such an exemption. Nor is there any good reason to upend decades of settled law.

A. Common Liability Is an Essential Element of a Contribution Claim.

This Court has on many occasions articulated the theory and principles upon which a contribution claim is founded. Among the most often quoted opinions is *Spitzack v. Schumacher*, 308 Minn. 143, 241 N.W.2d 641 (1976), in which the Court discussed the nature of the remedy and its required elements, including common liability: "The doctrine of contribution is an equitable doctrine which requires that persons under a common burden share that burden equitably." *Id.* at 145, 241 N.W.2d at 643. A viable contribution claim requires two elements: (1) common liability of joint tortfeasors; and (2) payment by one tortfeasor of more than its fair share. *Id.* at 147, 241 N.W.2d at 644. With respect to the first of those elements, the Court quoted one of its earlier cases in explaining that "the very essence of the action of contribution is 'common liability.'" *Id.* (quoting *Am. Auto. Ins. Co. v. Molling*, 239 Minn. 74, 76, 57 N.W.2d 847, 849 (1953)). Two corollary principles identified in *Spitzack* are (1) that "[c]ommon liability 'is created at the instant the tort is committed,'" *id.* (quoting *White v. Johnson*, 272 Minn. 363, 371, 137 N.W.2d 674, 679 (1965)), so that procedural defenses acquired after the cause of action accrues, *e.g.*, statutes of limitations, covenants not to sue, do not destroy common liability, *id.*; and (2) that "[i]t is well-established that it is joint Liability, rather than joint or concurring Negligence, which determines the right of contribution." *Id.* at 148 n.2, 241 N.W.2d at 645 n.2 (citations omitted).

In *Spitzack*, the Court applied the foregoing principles in holding that a liquor vendor could not recover contribution from an at-fault driver because the driver had been adjudged at trial to be less at fault than the decedent for whose death the plaintiffs had sued. *Id.* at 148-9, 241 N.W.2d at 644-5. Even though the driver's acts had been negligent, under comparative fault principles, he could not be liable to the plaintiffs, so common liability did not exist.

Minnesota courts have repeatedly adhered to the principles discussed in *Spitzack*.[4] For example, in *Hart v. Cessna Aircraft Co.*, 276 N.W.2d 166, 167 (Minn. 1979), an airplane manufacturer was barred from bringing a contribution claim against the owner-pilot of a plane that crashed, who had been adjudicated not liable to the plaintiff in a separate lawsuit.

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[4] This Court's precedents identifying common liability as a prerequisite to a valid contribution claim are as recent as this year, *Cargill, Inc. v. Ace Am. Ins. Co.*, 784 N.W.2d 341, 353 (Minn. 2010) (recognizing a right to contribution based on a common liability), and reach back more than a century. *See Canosia Tp. v. Grand Lake Tp.*, 80 Minn. 357, 357, 83 N.W. 346, 346 (1900) (defining contribution as "a payment made by each, or by any, of several having a common interest of liability of his share in the loss suffered..."). *See also, e.g., Roemhildt v. Gresser Cos., Inc.*, 729 N.W.2d 289, 298 (Minn. 2007) ("[c]ontribution is the remedy securing the right of one who has discharged more than his fair share of a common liability...to recover from another who is also liable..."); *Pautz v. Cal-Ros, Inc.*, 340 N.W.2d 338, 339 (Minn. 1983) (when "common liability exists, contribution is available"); *Lemmer v. IDS Props., Inc.*, 304 N.W.2d 864, 869 (Minn. 1980) (reaffirming the requirement of common liability to an action based on contribution); *Hammerschmidt v. Moore*, 274 N.W.2d 79, 81 (Minn. 1978) (explaining that the very essence of the action of contribution is common liability); *Reserve Ins. Co. v. Village of Big Lake*, 304 Minn. 148, 152, 230 N.W.2d 47, 49 (1975) ("if there is no common liability, there can be no contribution"); *Bunge v. Yager*, 236 Minn. 245, 252, 52 N.W.2d 446, 450 (1952) ("an action for contribution rests upon a common liability of joint tort-feasors to an injured party..."); *Parten v. First Nat. Bank & Trust Co.*, 204 Minn. 200, 206, 283 N.W. 408, 412 (1939) (describing contribution as "the right of one, who has discharged a common liability or burden, to recover of another also liable..."); *Waldref v. Dow*, 172 Minn. 52, 55, 214 N.W. 767, 768 (1927) (defining contribution as "a payment made by any one of several, having a common liability...").

The Court rejected the manufacturer's argument that Minnesota courts had "eliminated common liability as a prerequisite for contribution," holding instead that:

> Although we are aware that the requirement of common liability has been criticized, we have not eliminated it. We impose this requirement because *we believe that only a tortfeasor who is liable for a plaintiff's loss* should be required to contribute to the payment for that loss.

Hart, 276 N.W.2d at 168-9 (emphasis added). *See also Horton v. Orbeth*, 342 N.W.2d 112, 114 (Minn. 1984) (defendant was found negligent, but less so than the plaintiff, so there was no liability to plaintiff, and hence, no common liability with the other defendant seeking contribution).

URS contends that it has common liability with Jacobs because in its view, the statute of repose is no different than a statute of limitations, covenant not to sue, or other procedural or technical defense to a plaintiff's recovery. URS Br. at 18-21. This is a serious misreading of the precedents. It fails to acknowledge that this Court has made clear that there are important distinctions between statutes of repose and statutes of limitation. In *Weston v. McWilliams & Assocs., Inc.*, 716 N.W.2d 634, 641 (Minn. 2006), the issue was whether the repose provision of Minn. Stat. § 541.051 could validly eliminate a cause of action for contribution and indemnity even before the cause of action accrued. This Court held that it could do so, and its explanation included a discussion and comparison of statutes of repose and statutes of limitation. *Weston,* 716 N.W.2d at 641. Earlier precedents had established that once a cause of action accrues, constitutional due process requires that a plaintiff have a reasonable amount of time to bring suit. *Id.* (citing *Wichelman v. Messner*, 250 Minn. 88, 108-09, 83 N.W.2d 800, 816-17 (1957)). Accordingly, "one focus of a

constitutional challenge to a statute of limitations is whether it allows a reasonable time after the cause of action accrues for the party to enforce her rights." *Id.*

It is a different matter, however, with statutes of repose: "The constitutional legitimacy of statutes of repose stems from their substantive, rather than procedural, nature: a statute of limitations limits the time within which a party can pursue a remedy (that is, it is a procedural limit), whereas a statute of repose limits the time within which a party can acquire a cause of action (thus it is a substantive limit)." *Id.* at 641. Because a party does not have a vested right in a cause of action before it accrues, *id.* at 643, Minnesota and most other jurisdictions have held that a statute of repose may constitutionally eliminate a cause of action even before it arises. *Id.* at 641.

This substance-procedure distinction between statutes of repose and limitations has important implications for determining whether common liability exists. In light of *Weston* and this Court's other precedents, it is untenable to maintain as URS does that a statute of repose should be viewed no differently than a statute of limitation in determining whether common liability exists. This Court has repeatedly described the kinds of defenses, *e.g.*, statutes of limitations, covenants not to sue, failure to give statutorily required notice of a claim, as "procedural" or "technical." *Horton v. Orbeth*, 342 N.W.2d 112, 114 (Minn. 1984) ("technical"); *Jones v. Fisher*, 309 N.W.2d 726, 730 (Minn. 1981) ("technical procedural"); *Spitzack v. Schumacher*, 308 Minn. 143, 145, 241 N.W.2d 641, 643 (1976) ("procedural"). Any contention that a statute of repose is just another "procedural" or "technical" defense simply cannot be squared with this Court's express recognition that repose rights are "substantive." *See Weston,* 716 N.W.2d at 641.

URS goes on to argue that the issue in determining the existence of common liability is not whether a defense is a substantive or procedural one. URS Br. at 20. That proposition, of course, requires putting aside the cases cited above that have expressly relied on this distinction in deciding whether common liability exists. Moreover, URS misapprehends what is meant by the distinction. It argues, for example, that covenants not to sue are "substantive" (even though this Court has repeatedly characterized the defense based on them as procedural or technical) because created by contract. *Id.* The crucial point missed or ignored by URS is that a statute of repose is substantive because it eliminates not just a remedy, but the cause of action itself. *See Weston*, 716 N.W.2d at 641. Statutes of limitations, covenants not to sue, and statutory notice requirements are procedural because these defenses are acquired after a cause of action has arisen, and are merely a limitation on when or whether a remedy may be obtained for an accrued cause of action.

B. This Court's Precedents Recognizing that Common Liability Can Be Predicated on Defendants' Liability to a Plaintiff on Different Legal Theories Have Not Eliminated the Requirement.

URS suggests, throughout much of its argument, that Jacobs has relied on outdated precedents on the required elements of common liability, and that the court of appeals did the same. This is erroneous. What this Court has, for some time, recognized is that common liability can be predicated on defendants' liability for an injury to a plaintiff on different legal theories. That was the essence of the holding in three of this Court's cases cited most frequently by URS: *Jones v. Fisher*, 309 N.W.2d 726 (Minn. 1981), *Lambertson v. Cincinnati Corp.*, 312 Minn. 114, 257 N.W.2d 679 (1977), and *Peterson v. Little-Giant Glencoe*

Portable Elevator Div. of Dynamics Corp. of Am., 366 N.W.2d 111 (Minn. 1985). *Jones* held that common liability existed where one defendant was liable to the plaintiff as a liquor vendor under the Civil Damages ("Dram Shop") Act and another liable under the Wrongful Death Act. *Jones*, 309 N.W.2d at 729-30 ("[s]ince all defendants are liable to decedent's spouse either in her capacity as trustee or individually, the common liability requirement is satisfied"). *Lambertson* and *Peterson* involved the scenario in which a plaintiff injured in the course and scope of employment sues a third party for the injuries, and the third party seeks contribution from the plaintiff's employer. Before *Lambertson*, a third-party tortfeasor could not recover contribution from a negligent employer because the exclusive remedy provision of the workers' compensation statutes gave the employer immunity from suit in tort by its employees. *Hendrickson v. Minn. Power & Light Co.*, 258 Minn. 368, 374-75 & n.22, 104 N.W.2d 843, 849 & n.22 (1960). *Lambertson* changed this result by allowing contribution from the employer up to the amount the workers' compensation benefits paid or payable. *Lambertson*, 312 Minn. at 130, 257 N.W.2d at 689. This Court explained its decision in light of the common liability requirement:

> While there is no common liability to the employee in tort, both the employer and the third party are nonetheless liable to the employee for his injuries; the employer through the fixed no-fault workers' compensation system and the third party through the variable recovery available in a common law tort action.

312 Minn. at 128, 257 N.W.2d at 688. In *Peterson*, the Court enforced the same principle, again commenting on how the two defendants were both liable to the plaintiff, but on different theories:

> The manufacturer had liability to the employee in tort, the employer by the workers' compensation laws. There was no common liability *in tort* between them; nonetheless, they both were liable to the employee and thus common liability existed.

Peterson, 366 N.W.2d at 116.

None of these cases eliminated the requirement of common liability, and the opinions are explicit about allowing contribution because each of the defendants had liability on some theory to the plaintiff. This point was made yet again in another one of the cases that URS cites throughout its brief, *Horton v. Orbeth, Inc.* 342 N.W.2d 112 (Minn. 1984):

> *Lambertson* . . . and its progeny do not stand as authority for the proposition that common liability is no longer relevant to the availability of contribution. . . .We permitted the manufacturer to recover "contribution" from the employer even though there was no common liability in *tort:* Under the exclusive remedy clause of the Workers' Compensation Act the employer enjoyed a personal immunity from tort liability to his employee. Since, however, the employer was liable for the no-fault benefits fixed by the Workers' Compensation Act, the manufacturer and the employer were each liable-albeit uncommonly-to [the plaintiff]. In the sense, then, that both were liable to [the plaintiff], "common liability" did exist.

Horton, 342 N.W.2d at 114-15; *see also City of Wilmar v. Short-Elliott Hendrickson*, 512 N.W.2d at 874 ("Common liability exists when both parties are liable to the plaintiff for the same damages, even though their liability may depend on different legal theories.").

Jones, *Lambertson*, *Peterson*, and other cases in that line have no application here because this is *not* a case in which Jacobs and URS both have liability to plaintiffs, but on different theories. Jacobs has not at any time had any liability to plaintiffs on any theory because the

statute of repose had eliminated any potential liability even before plaintiffs could have acquired a cause of action.

URS goes on to argue that this Court's decision in *Horton* is "inconsistent" with earlier decisions on common liability and suggests that the case therefore set forth a new standard for determining whether contribution liability exists. *See* URS Br. at 22. The contention is baseless. *Horton* represented an application of, and not in any sense a departure from, this Court's longstanding precedents on common liability. The Court's discussion of the common law of contribution begins by identifying the same principles and precedents discussed above. *See Horton*, 342 N.W.2d at 114 (citing and quoting approvingly from, *e.g.*, *Spitzack*, *Am. Auto. Inc. Co.*, and *Hart*). The Court held that two defendants adjudged liable to plaintiff for injuries suffered in a boating accident could not recover contribution from two other defendants who had been found by the jury to be less at fault than the plaintiff for his injuries, and who thus could not be liable to the plaintiff under the comparative fault statute. *Id.* at 113-14. The Court's holding was fully consistent with and followed from what it aptly described as "a long line of cases [that] have uniformly declined to allow contribution where there has been a valid determination on the merits that common liability (however flexible its definition) could never have existed," a proposition for which the Court cited to *Spitzack*.[5]

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[5] *Horton* also illustrates the obvious error in another of URS's arguments. URS contends that common liability exists here because the statute of repose is an affirmative defense, and affirmative defenses are waived if not pled. *See* URS Br. at 22. Under this rather preposterous theory, of course, only defenses going to the subject matter jurisdiction of the court would satisfy the URS test for the absence of common liability. If URS were correct, for example, then *Horton* (as well as *Spitzack*) was decided incorrectly because comparative fault is an affirmative defense. *See Moorhead Econ. Dev. Auth. v. Anda,* 789

Ultimately, URS's position is that Jacobs' repose defense is not one based on the "merits." *See* URS Br. at 19 (citing and quoting *Jones* and *Horton*). This is simply a different way, however, for URS to restate its discredited contention (*see* discussion above at 14-16) that a repose defense is just another "technical" or "procedural" defense, like one based on the statute of limitations, a covenant not to sue, or failure to give statutory notice of a claim. It could not be clearer than it is from the language in both *Jones* and *Horton*, that the Court's reference to defenses "that do not go to the merits of the case" is a description of the "technical" or "procedural" defenses that have long been held not to defeat common liability. *See Horton*, 342 N.W.2d at 114 ("We have held that certain technical defenses, defenses that do not go to the merits of the case, do not distinguish common liability . . ."); *Jones v. Fisher*, 309 N.W.2d 726, 729 (Minn. 1981).

URS's selective definition of common liability ignores this Court's admonition that "what constitutes 'common liability' is not susceptible of a single precise definition." *Horton*, 342 N.W.2d at 114. Thus, URS fails to address those cases in which the acts or omissions of a party allegedly contributed to an injury, but could not—at any time, even on the date of injury—support a contribution claim because of the absence of common liability. For example, a liquor vendor sued by the family of an intoxicated driver may not recover contribution from the driver because the driver has no liability to his family for their damages arising from his injuries; there is no common liability. *See, e.g.*, *Conde v. City of Spring Lake Park*, 290 N.W.2d 164, 166 (Minn. 1980) ("Since the father in this case is not liable to

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N.W.2d 860, 890 (Minn. 2010). *See also* Minn. R. Civ. P. 8.03 (identifying, among other things, "contributory negligence" as a defense which a party "shall set forth affirmatively").

his wife or family for injuring himself or for injuries to himself caused by a third party, there is no common liability and no contribution can be had by the vendors")[6]; *id.* at 165 (rejecting the contention that *Lambertson* had abolished the requirement of common liability for contribution claims); *Ascheman v. Village of Hancock*, 254 N.W.2d 382, 384 (Minn. 1977) (holding common liability did not exist between a liquor vendor and intoxicated driver in an action brought by the driver's family because the vendee had no liability to his family under then-existing intrafamily tort immunity). *See also Nelson v. Larsen*, 405 N.W.2d 455, 458 (Minn. Ct. App. 1987) (relying on *Conde*, *Spitzack*, and *Jones* to hold that a defendant driver is not entitled to recover contribution from liquor vendor who served alcohol to intoxicated pedestrian struck and killed by driver because the liquor vendor had no liability as a matter of law to voluntarily intoxicated person). Similarly, before this Court abolished interspousal tort immunity, a negligent driver-husband could not be liable in contribution for injuries sustained by his wife in a car accident because the husband could not be liable to his wife. *See Am. Auto Ins. Co. v. Molling*, 239 Minn. at 76-82, 57 N.W.2d at 850-52. In these cases, there is an absence of common liability not because the party against whom contribution is sought is determined to be innocent or otherwise without fault, but instead because the alleged negligent acts or omissions are not legally sufficient for the plaintiff to state a claim against that party. The same is true where a plaintiff's cause of action has been extinguished before accrual by the repose provision of Minn. Stat. § 541.051; expiration of the repose

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[6] In contrast, when the family of an intoxicated person is suing instead for their own personal injuries, common liability exists between the liquor vendor and the intoxicated person. *See Pautz v. Cal-Ros, Inc.*, 340 N.W.2d 338, 340 (Minn. 1983) (liquor vendor entitled to seek contribution from intoxicated person who negligently caused fire that injured his family members).

period eliminates any potential liability between the plaintiff and the party in whose favor the repose provision operates; no legally cognizable claim ever arises, so there can be no common liability.

The foregoing demonstrates that the elimination of common liability due to a repose statute is not brought about by a "factor *extrinsic* to the tort itself," *Horton v. Orbeth, Inc.* 342 N.W.2d 112, 114 (Minn. 1984), any more than in these other cases in which the absence of common liability precluded a contribution claim. For example, a party who has no common liability with another to the plaintiff because its fault is found by a jury to be less than the fault of the plaintiff owes its immunity from contribution liability to the comparative fault statute. Similarly, the inability of a liquor vendor to obtain contribution from an intoxicated driver for damages incurred by the driver's family is due in part to the provision in the Dram Shop Act, which exempts application of the comparative fault statute to actions brought by the family of the intoxicated person. *See Conde*, 290 N.W.2d at 165 & n.1. In just the same manner, by operation of the repose statute, no alleged acts or omissions of S&P were sufficient to create any liability to the plaintiffs when their injuries occurred (or any time afterwards), so there can be no common liability with URS.

C. The Court of Appeals Applied the Correct Standard and Law in Holding that URS's Contribution Claim Against Jacobs Should Be Dismissed Because of the Absence of Common Liability.

In holding that Jacobs was entitled to dismissal of URS's claims against it due to the absence of common liability to the plaintiffs because of the repose provision of Minn. Stat. § 541.051, the court of appeals correctly applied the foregoing principles to the undisputed material facts. URS seizes on one sentence in the court of appeal's opinion to argue that it

applied the wrong standard: "Under the reasoning of *White*, 272 Minn. 363, 137 N.W.2d 674 (1965), a personal defense that is based upon a well-established public policy of immunity may defeat a contribution claim even though the defense is not related to the defendant's acts, omissions, or culpability." *A.23.* From this statement, URS argues that the "court of appeals mistakenly thought personal immunities do not defeat common liability because those immunities apply the moment a tort is committed and do not arise later." URS Br. at 21-22.

It is URS, however, that is mistaken. The decision in *White v. Johnson*, 272 Minn. 363, 137 N.W.2d 674 (1965), was fully consistent with the principle discussed above that a technical or procedural defense does not destroy common liability. The Court held, consistent with earlier precedents, that a party's failure to give timely statutory notice to a municipality of a tort claim did not eliminate common liability. *Id.* at 371, 137 N.W.2d at 680; *id.,* 137 N.W.2d at 679 (noting that the same rule applies to defenses based on covenants not to sue and statutes of limitations). It distinguished such a defense from those in which, for example, a father cannot be required to contribute to an award to his wife or son because of then-existing intrafamily tort immunity. *See, e.g., Ascheman,* 254 N.W.2d at 384. The Court's characterization of non-liability for contribution in these latter cases as arising from a "personal defense" based on a public policy of "immunity" is just another way of stating, as the Court did in *Conde*, *Ascheman* and *Am. Auto. Ins. Co.* (*see* discussion above at

20-22), that common liability did not exist in any of those cases because there was never any legal theory on which the father or husband could be found liable to his family.[7]

URS oversimplifies the issue when it argues or implies that, after *Horton*, common liability exists if a party's defense is based on a "personal immunity." *See* URS Br. at 19 n.15, 21-22. In *Horton*, the only specific reference to a "personal immunity" is the one that *Lambertson* eliminated as an obstacle to common liability. *See Horton*, 342 N.W.2d at 114 ("Under the exclusive remedy clause of the Workers' Compensation Act the employer enjoyed a personal immunity from tort liability to his employee"). Whether a "personal defense" or "immunity" destroys common liability depends not on a label, but instead on the principles articulated by this Court, including whether it is a procedural-technical defense acquired after the cause of action acquired, or one that eliminated the potential for liability to the plaintiff on any theory at any time. For example, in *Spitzack v. Schumacher*, 308 Minn. 143, 241 N.W.2d 641 (1976), common liability was lacking and contribution denied because one defendant had a "personal defense" based on having been found less negligent than the plaintiff. *Id.* at 146, 241 N.W.2d at 643; *id.* at 147-48, 241 N.W.2d at 644 ("a valid judicial determination on the merits that a defendant never was liable to a plaintiff negates the element of common liability and thereby *immunizes* that defendant from any subsequent action for contribution arising out of the same facts") (emphasis added). Similarly, as the

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[7] The Court in *White* also gave the exclusive remedies provision of the Workers' Compensation Act as another example of a personal defense that defeated common liability. *White*, 272 Minn. at 369, 137 N.W.2d at 678. As discussed above, this was certainly true until the Court's decision in *Lambertson* based on circumstances (common liability to a plaintiff based on different legal theories) that are not at all present here. *See* discussion above at 17-18.

cases discussed above demonstrate, before the abolition of intrafamily tort immunity, such immunities were sufficient to destroy common liability. The statute of repose eliminates common liability for the same reasons that these other substantive defenses do.

URS implies that it is no longer relevant in ascertaining the existence of common liability to determine whether a defense to the plaintiff's claim exists "at the moment a tort is committed." *See* URS Br. at 21 n.17, 21-22. This is an astonishing denial of a longstanding tenet of contribution law, and to accept it would effectively discard the many precedents that have distinguished consequentially between defenses a party has from the instant an injury occurs, and those that are only acquired afterwards. Neither *Jones*, *Horton*, nor any other of the Court's recent decisions have disavowed this principle, and just two months before *Horton* was decided, it was the basis for one of the Court's holdings in another case. *See Pautz v. Cal-Ros, Inc.*, 340 N.W.2d 338, 340 (Minn. 1983) ("Nor does the plaintiffs' election to sue only the [liquor] vendor deprive the vendor of its right to contribution from the intoxicated wrongdoer. Common liability is created at the instant the tort is committed whether or not the injured person chooses to assert his claim.").[8]

[8] In another case, decided after *Jones*, and less than three years before *Horton*, the Court held that a lawyer found liable for legal malpractice could not seek contribution from the physician whose medical malpractice led to the claim against the lawyer for rendering negligent advice about the statute of limitations. The reason: "[T]here was no common liability at the moment either tort was committed." *Vesely, Otto, Miller & Keefe v. Blake*, 311 N.W.2d 3, 5 (Minn. 1981). URS offers no explanation for its assertion that *Vesely* is "inconsistent" with *Horton*, *see* URS Br. at 22, and it certainly is not.

D. URS's Contribution Claim Should Not Be Treated as One for Indemnity.

In the end, URS pleads that its contribution claim should instead be treated like one for indemnity, to the extent that the latter does not require common liability. *See* URS Br. at 23-24. This is yet another call by URS for this Court to ignore or overrule its precedents. In *Vesely, Otto, Miller & Keefe v. Blake*, 311 N.W.2d 3, 5 (Minn. 1981), the defendant argued that it should be able to recover in indemnity as an alternative to contribution, which was precluded in that case by the absence of common liability. The Court identified the five rules for indemnity recovery set forth in *Hendrickson v. Minnesota Power & Light Co.*, 258 Minn. 368, 372-73, 104 N.W.2d 843, 848 (1960), and noted that the defendant's claim fit only within the fourth rule, "which allows indemnity '[w]here the one seeking indemnity has incurred liability merely because of failure, even though negligent, to discover or prevent the misconduct of the one sought to be charged.'" *Vesely*, 311 N.W.2d at 6 (quoting *Hendrickson*, 258 Minn. at 373, 104 N.W.2d at 848 (footnote omitted)). The Court summarily rejected the defendant's request, noting that "rule 4 of the *Hendrickson* rules was expressly eliminated in *Tolbert v. Gerber Indus., Inc.*, 255 N.W.2d 362 (Minn. 1977)." *Id.* After *Tolbert*, a claim based on rule 4 was limited to one for contribution. *Tolbert*, 255 N.W.2d at 366-68.

Like the defendant in *Vesely*, URS argues that the claims against it arise under the fourth rule of *Hendrickson*. *See* URS Br. at 23. It has given no reason why the result should be different in this case. There is none, and there is no valid reason to overrule *Vesely* and *Tolbert*, which is essentially the relief URS seeks.

E. No Equitable Grounds Support Disregarding Settled Precedent to Allow URS's Contribution Claim.

Throughout its brief, URS complains that it should be allowed to proceed on a contribution claim because contribution is a "flexible, equitable remedy." But as the foregoing discussion demonstrates, there is not a single instance in which this Court has—whether on grounds of fairness, equity, or any other reason—allowed a contribution claim to proceed against a party who at *no time* had liability to the plaintiff on *any theory*. Every contribution claim is—by definition—based on a theory that the facts and circumstances of the case are such that one defendant has paid more than its "fair share," so that "equitable" apportionment and reimbursement ought to follow. This has led defendants often to seek elimination of the common liability requirement, and this Court has repeatedly declined to do so. There is no justification to do differently in this case or to otherwise depart from venerable and settled precedents.

Moreover, URS's pleas of equity are particularly hollow in the circumstances of this case. To a large extent, they are not based on allegations in the pleadings assumed to be true, but instead on unfounded speculation about what facts might or will unfold. URS contends that, in paying more than $50 million for its settlement with plaintiffs, it was paying for more than its "fair share," *i.e.*, that it was unfairly paying for both its share and Jacobs' share. But URS could only be *required* to pay for another party's share of the plaintiffs' damages if it was adjudged jointly liable to the plaintiff for those damages. With amendments to the comparative fault statute passed in 2003, Minnesota severely limited the circumstances under which a party can be jointly liable with another. The general rule now is that parties are severally, rather than jointly liable for an indivisible injury. *See* Michael

Steenson, *Joint and Several Liability in Minnesota: The 2003 Model*, 30 Wm. Mitchell L. Rev. 845, 884-85 (2004). The applicable provision of Minnesota's comparative fault statute provides as follows:

> **604.02. Apportionment of Damages**
>
> **Subdivision 1. Joint Liability.** When two or more persons are severally liable, contribution to awards shall be in proportion to the percentage of fault attributable to each, except that the following persons are jointly and severally liable for the whole award:
>
> (1) a person whose fault is greater than 50 percent;
>
> (2) two or more persons who act in a common scheme or plan that results in injury;
>
> (3) a person who commits an intentional tort; or
>
> (4) a person whose liability arises under [certain environmental statutes].

Minn. Stat. § 604.02, subd. 1 (2010).

URS does not indicate under which of these provisions it risked being found jointly liable with Jacobs to the plaintiffs. It is obvious that scenarios (2), (3) and (4) could have no application. There is no allegation that Jacobs (or S&P) and URS acted in a "common scheme or plan;" the work of S&P and URS is separated in time by decades. Plaintiffs have made no allegation that URS committed an intentional tort, and the environmental liabilities designated under scenario (4) are not at issue.

Apparently URS contends it risked being jointly liable to the plaintiffs under the first scenario. But that would have required first a jury finding that URS was more than 50% at fault for the plaintiffs' injuries. Since the case has not proceeded to trial and their has been

no such allocation, it is pure speculation that URS could or would have been required to pay more than its share of the verdict. In effect, by settling the case in the manner it did, URS declined to rely on the significant protection against joint liability that § 604.02 now affords, and instead placed a bet that it would likely be found *primarily* at fault for the plaintiffs' injuries. In those circumstances, URS should not be heard to complain about the unfairness of the result which it essentially controlled by entering into the settlement.

Moreover, URS ignores the fact that the comparative fault statute forecloses a contribution recovery, even assuming it had been adjudged greater than 50% at fault for the plaintiff's damages. The statute provides "[w]hen two or more person are severally liable, contributions to awards shall be in proportion to the percentage of fault attributable to each." Minn. Stat. § 604.02, subd. 1. As discussed elsewhere (*see* discussion above at 10-25), Jacobs has never had liability to the plaintiffs—it has never been severally liable—so the statute does not contemplate that URS could ever recover contribution from Jacobs. *Cf. Horton*, (noting that the former comparative fault statute (§ 604.01 (1976)) "provides in plain language for proportionate contribution among those who are 'jointly liable' to the plaintiff and who are 'jointly and severally liable for the entire award.' The statute makes no provision for contribution by one who is not jointly liable to the plaintiff").

III. The 2007 Amendments to Minn. Stat. § 541.051 Do Not Allow URS to Recover Any Contribution from Jacobs.

A. The Repose Provision In Effect Prior to the 2007 Amendments Expressly Extinguished Any Contribution Claims Against Jacobs.

While the absence of Jacobs' common liability with URS to the plaintiffs is, alone, a sufficient reason to affirm the court of appeals' decision, Jacobs is entitled to dismissal for

another, independent reason. The repose provision of the statute in effect prior to the effective date of the 2007 amendments expressly applied to extinguish contribution and indemnity claims on the same basis as direct claims. *See* Minn. Stat. § 541.051, subd. 1(a) (2006). In fact, all prior versions of the statute provided the same repose period for contribution and indemnity claims as for direct claims. At times, this repose period has been 15 years and at others, 10 years. In either case, the version of § 541.051 in effect prior to the 2007 amendments extinguished any contribution claims by URS against Jacobs arising out of the Bridge collapse long before they even accrued, and the 2007 amendments did not revive them.

URS does not dispute that the repose provision of the prior version of § 541.051 expressly applied to extinguish contribution claims. *See* URS Br. at 25. The parties' disagreement is over whether the 2007 amendments, made retroactive to June 30, 2006, apply to URS's contribution claims. For the reasons discussed in the following section, the amendments are not effective for claims that had already been extinguished prior to the effective date of the amendments. Accordingly, Jacobs is also entitled to dismissal on this separate ground.

B. The 2007 Amendments Do Not Apply Because Any Claims Against Jacobs Were Extinguished Prior to the June 30, 2006, Effective Date of the Amendments.

In 2007, the legislature amended § 541.051 with respect to the accrual and timely commencement of actions for contribution and indemnity. The amendments removed the ten-year repose provision for contribution and indemnity claims in subdivision 1(a) and added a new subdivision 1(b), as follows:

> (b) Notwithstanding paragraph (a), an action for contribution or indemnity arising out of the defective and unsafe condition of an improvement to real property may be brought no later than two years after the cause of action for contribution or indemnity has accrued, regardless of whether it accrued before or after the ten-year period referenced in paragraph (a).

Minn. Stat. § 541.051, subd. 1(b). *Add.43.* The amendments also provided in subdivision 1(c) that a cause of action for contribution or indemnity accrues upon the earlier of the commencement of the action against the party seeking contribution or indemnity, or payment of a final judgment, arbitration award or settlement. *Add.43.* Minn. Stat. § 541.051, subd. 1(c). Subdivision 2 established a repose period of 12 years for injuries occurring during the ninth or tenth year after substantial completion, but provided that "[n]othing in this subdivision shall limit the time for bringing an action for contribution or indemnity." The legislature made the amendments retroactive to June 30, 2006.[9]

While there is no doubt that the legislature expressly made the 2007 amendments retroactive, it does not follow that the amendments revived claims that had been

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[9] The 2007 amendments to § 541.051 are contained in two separate laws: 2007 Minn. Laws, ch. 140, art. 8, § 29 (House File No. 1208), signed into law by Governor Pawlenty on May 25, 2007 (*Add. 41*) *and* 2007 Minn. Laws, ch. 105, § 4 (Senate File No. 241), signed into law by Governor Pawlenty on May 21, 2007. *Add. 34.* The two laws are identical *except* for the "EFFECTIVE DATE" language. The House File version states: "This section is effective retroactive to June 30, 2006." 2007 Minn. Laws, ch. 140, art. 8, § 29. The Senate File version states: "This section is effective retroactively from June 30, 2006." 2007 Minn. Laws, ch. 105, § 4. In codifying the amendments, the Office of the Revisor of Statutes only identifies 2007 Minn. Laws, ch. 140, art. 8, § 29 for the 2007 amendments. The court of appeals, in its separate opinion addressing the State's claims against Jacobs, held that the separate use of "to" and "from" by the House and Senate has a substantive effect on the scope of the retroactivity. *See In re Individual 35W Bridge Litig.*, 787 N.W.2d 643, 651 n.6 (Minn. Ct. App.), *rev. granted,* Minn. Nov. 16, 2010. The conclusion is unwarranted for the reasons discussed in the text below. *See* discussion below at 33-39.

extinguished *before* the June 30, 2006, effective date, as the claims against Jacobs had been. The effective date for a statute would be meaningless if it did not signify an intended distinction and difference in treatment between events before and after the effective date. Under URS's interpretation, however, the 2007 amendments apply equally to claims extinguished before the effective date and those arising or extinguished afterwards.

In support of its contention that the 2007 amendments apply retroactively to claims extinguished prior to June 30, 2006, URS cites this Court's opinion in *Gomon v. Northland Family Physicians, Ltd.*, 645 N.W.2d 413, 417 (Minn. 2002). *Gomon* considered the effective date of amendments to the State's medical malpractice statute of limitations. The legislature enacted an amendment to the statute deleting a two-year statute of limitations for medical malpractice claims and replacing it with a four-year limitations period, effective on August 1, 1999, for actions "commenced on or after" that date. *Id.* at 415 (citing Act of Mar. 26, 1999, ch. 23, §§ 1-3). This Court held that the plain language "commenced on or after" straightforwardly established the legislature's intent that the amendments applied to revive certain claims that had become time-barred under the prior statute. *Id.* at 417. No additional "revival" language was necessary to evidence the legislature's intent because by its express terms the "commenced on or after" provision effected a revival. *Id.*

The 2007 amendments to § 541.051 do not contain the kind of language considered in *Gomon*. Indeed, what *Gomon* instructs is that if the legislature *had* intended for the 2007 amendments to § 541.051 to revive claims extinguished before the effective date, it could have used the same or similar language that it used when amending the medical malpractice statute. Because it did not, this Court should interpret the amendments as applying only to

causes of action that had not been extinguished before the June 30, 2006, effective date. This would give effect to the legislature's express intent that the amendments have a retroactive application, while at the same time giving meaningful significance to the specific retroactive effective date that the legislature selected.

URS relies in part on the interpretation of the retroactive effective date language by the court of appeals in its separate opinion concerning the State's claims against Jacobs. *See* URS Br. at 26-28; *In re Individual 35W Bridge Litig.*, 787 N.W.2d 643, 651 n.6 (Minn. Ct. App.), *rev. granted,* Minn. Nov. 16, 2010. That interpretation is based on the fact that the separate House and Senate versions signed by the Governor on May 21, 2007, and May 25, 2007, used slightly different language: The Senate session laws provided that the amendments were "effective retroactively from June 30, 2006," while the House session laws made the amendments "effective retroactive to June 30, 2006." 2007 Minn. Laws, ch. 105, § 4; 2007 Minn. Laws, ch. 140, art. 8, § 29. The court of appeals interpreted the different language to mean that the amendments were retroactive "indefinitely into the past." *In re Individual 35W Bridge Litig.*, 787 N.W.2d at n.6. This interpretation assumes on the basis of *no* evidence that the choice of "to" by one body of the legislature and "from" by the other was intended by them to have two different and complementary meanings. *See* URS Br. at 26-28. It is much more plausible that the two slightly different formulations by separate legislative bodies were intended to mean the same thing. URS's interpretation of the retroactivity language is an unreasonable one, inconsistent with common usage. *See, e.g., Kratzer v. Welsh Cos., LLC,* 771 N.W.2d 14, 21 (Minn. 2009) (plain language of a statute controls where the language is

susceptible of only one reasonable meaning).

URS's interpretation of the retroactivity language is not only strained and unreasonable, it has the effect of writing words into the law, *viz.* "indefinitely into the past," that are not there, thereby dramatically changing the substance of the statute. *See Genin v. 1996 Mercury Marquis*, 622 N.W.2d 114, 117 (Minn. 2001) ("The rules of [legislative] construction forbid adding words or meaning to a statute that were intentionally or inadvertently left out."). Interpreting the retroactive provision to mean "both before and after June 30, 2006," also renders the legislature's selection of the specified date superfluous; it might as well read "June 30, 1906," or any other date prior to the enactment date. *See Amaral v. St. Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999) (whenever it is possible, no word, phrase, or sentence of a statute should be deemed superfluous, void, or insignificant).

If there is any ambiguity in the scope of the retroactivity of the 2007 amendments to § 541.051, there are several canons of instruction to which this Court can resort, including: (1) the occasion and necessity for the law; (2) the circumstances under which it was enacted; (3) the mischief to be remedied and (4) the object to be attained. *See* Minn. Stat. § 645.16 (2010). Consideration of these factors favors an interpretation of the 2007 amendments that does not revive claims extinguished prior to the June 30, 2006, effective date.

With respect to these factors, there is general agreement that the 2007 amendments were passed in response to this Court's decision in *Weston v. McWilliams & Assocs., Inc.*, 716 N.W.2d 634, 641 (Minn. 2006). The opinion in *Weston* was filed on June 29, 2006. The 2007 amendments were made effective to June 30, 2006, and the selection of date was not a

coincidence. *See also* URS Br. at 26, 30 (noting that the 2007 amendments were a response to *Weston*). In *Weston*, the defendant general contractor was sued in May 2003, two months before the end of the ten-year statutory repose period for a home completed in July 1993. *Weston,* 716 N.W.2d at 636-37. The general contractor filed third-party complaints seeking contribution in March and April 2004, after the ten-year repose period had ended. *Id.* at 637. The district court granted one of the third-party defendant's motions for summary judgment on the ground that the claims for contribution and indemnity had been extinguished by the ten-year repose period. *Id.* This was so even though the repose statute at that time provided that contribution and indemnity claims did not accrue until "payment of a final judgment, arbitration award, or settlement arising out of the defective and unsafe condition." Minn. Stat. § 541.051, subd. 1(b) (2006). The court of appeals reversed, holding that if a contribution and indemnity claim accrues after the ten-year repose period, then the claim should be deemed as a matter of law to have accrued at the end of the tenth year following completion of substantial construction. *Weston*, 716 N.W.2d at 638. This Court reversed the court of appeals, holding that under the plain meaning of the statutory language, the contribution and indemnity claims had been extinguished by the end of the repose period even though they had not yet "accrued," as defined in the same statute. *Id.* at 639-40.

The general contractor in *Weston* complained that it had no control over when it could bring its contribution and indemnity claims because they were derivative of the underlying action, for which it had no control over the date commenced. *Id.* at 639. This Court responded that the argument:

> presents a distinction that the legislature could have recognized, but did not. We agree with [third-party

> defendant's] assertion that, had the legislature wanted to declare a separate and different repose period for contribution and indemnity claims, it could have done so explicitly.

Id.

The 2007 amendments addressed the aspects of the former repose statute which, as the facts in *Weston* featured, could make the timeliness of a defendant's contribution or indemnity claim a matter of fortuity over which it had no control. Under the prior version, a plaintiff's injury might occur before the end of the repose period, but he or she might commence suit so late in the period (or even afterwards) that a defendant's contribution and indemnity claims are foreclosed by the plaintiff's tardiness. That fortuity of choice, however, does not arise, as in this case, when the plaintiff's injury occurs after the repose period has already expired. The 2007 amendments eliminated the potential that a plaintiff's election about when to commence an action could determine the timeliness of a defendant's contribution or indemnity claim. While the legislature can certainly do more than pass a law addressing just the facts of a particular case—and here it eliminated the repose provision for contribution and indemnity claims—nothing in these circumstances lends support to the view that the legislature was trying to reach endlessly into the past to revive claims long ago extinguished.

The consequences of an interpretation giving the 2007 amendments retroactive effect into the indefinite past are such that it should not be lightly presumed that this was the legislature's intent. *See* Minn. Stat. § 645.16(6). Such an interpretation would represent a sea change, impacting hundreds or thousands of parties (*e.g.*, contractors, subcontractors, engineers, materials suppliers, owners) who had acquired repose rights against contribution

and indemnity claims under the former versions of § 541.051, and who now or some day would face sudden revival of those potential liabilities. Just by way of illustration, it would pave the way for contribution and indemnity suits against the successors to James J. Hill's Great Northern Railway for injuries arising out of defects in the 1883 Stone Arch Bridge or suits against the successors to Cass Gilbert for injuries arising out of defects in the 1905 Minnesota State Capitol—all because a retroactive date of June 30, 2006, is wrongly interpreted to have intended revival of claims extinguished both before and after that date.

The immunity conferred by § 541.051 is a substantive limitation on acquiring a cause of action, in contrast to the merely procedural limitation of a statute of limitation, which only limits the time that a remedy may be pursued. *Weston*, 716 N.W.2d at 641. In similar contexts, this Court has made explicit that statutes of repose generally create "a substantive right in those protected to be free from liability after the legislatively-determined period of time." *Camacho v. Todd & Leiser Homes*, 706 N.W.2d 49, 55 (Minn. 2005) (quoting 54 C.J.S. *Limitations of Actions*, § 5 (2005)). A statute of repose "'is intended to terminate the possibility of liability after a defined period of time . . .. Such statutes reflect the legislative conclusion that a point in time arrives beyond which a potential defendant should be immune from liability for past conduct.'" *Weston*, 716 N.W.2d at 641 (quoting 51 Am. Jur. 2d *Limitation of Actions* § 18 (2000) (footnotes omitted)). Statutes of repose "provide[ ] certainty and finality with a bright line bar to liability" and give parties the ability "to plan their affairs without the potential for unknown liability." *Id.* at 642 (quoting *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 980 (Ind. 2000) (upholding ten-year repose statute in favor of product manufacturer)). The repose statute is based on a conclusion that, after a decade of use, "failures are 'due to

reasons not fairly laid'" at the door of the party in whose favor the statute operates and are instead "due to wear and tear or other causes." *Id.* (quoting *McIntosh*, 729 N.E.2d at 980). In the case of structures, repose statutes also reflect the conclusion that long life spans make them susceptible to deterioration and negligent maintenance completely outside the control of the original designer. *See* Michael J. Vardaro & Jennifer E. Waggoner, Note, *Statutes of Repose—The Design Professional's Defense to Perpetual Liability*, 10 St. John's J. Legal Comment. 697, 713 (1995).

Given the longstanding policy in this State underlying the repose statute, the quality of the interest it protects, and the consequences of indefinite retroactive repeal of the immunity, an interpretation that the 2007 amendments apply to revive claims "indefinitely into the past" is simply so plausible. It is certainly not so on the basis of the specific retroactivity date that the legislature chose, and it beggars belief to suppose that such an extraordinary interpretation turns on the use by a legislative body of one preposition ("from") over another ("to"). URS's claims against Jacobs were extinguished under prior versions of § 541.051 long before they even accrued, and the 2007 amendments did not revive them.

Finally, it is presumed that "the legislature does not intend to violate the Constitution of the United States or of this state." Minn. Stat. § 645.17(3). For the reasons discussed below, the right of immunity from suit or damages acquired by Jacobs under the prior versions of Minn. Stat. § 541.051 is protected by the due process clauses of the United States and Minnesota constitutions. Depriving Jacobs of its right to repose would violate its constitutional due process rights. If the legislature did in fact intend to revive claims that

had been extinguished before the June 30, 2006, effective date of the 2007 amendments to § 541.051, then Jacobs' constitutional claims must be decided. This Court, however, will avoid deciding a constitutional issue if the case can be decided on another basis. *See State v. Jackson*, 742 N.W.2d 163, 175 (Minn. 2007). These rules furnish additional reasons the Court should interpret the scope of the retroactivity as not reviving claims extinguished prior to June 30, 2006.

C. Even if Applicable to this Case, the 2007 Amendments to Minn. Stat. § 541.051 Did Not Change or Eliminate the Common Liability Requirement.

The court of appeals correctly rejected URS's argument that the 2007 amendments to Minn. Stat. § 541.051 eliminated the requirement of common liability for contribution claims arising out of an improvement to real property. *Add.13-14.* So even if the amendments applied to causes of action extinguished prior to the June 30, 2006, effective date, the absence of common liability in this case would preclude URS's contribution claim.

URS mounts a tortuous assault on simple language of the amendments to reach its desired conclusion. *See* URS Br. at 34-37. If the legislature had intended to eliminate the requirement of common liability for contribution claims when direct claims accrue after expiration of the 10-year repose provision of § 541.051 subd. 1(a), it could have done so with simple language. But it did not. As the court of appeals held, the "notwithstanding" language of subd. 1(b) is necessary to exempt contribution and indemnity claims from the 10-year repose provision of subd. 1(a) that would otherwise apply. *Add.19-20.* The same is true with respect to the clause in subd. 1(b) that contribution and indemnity claims may be brought within the two-year period provided for "regardless of whether it accrued before or

after the ten-year period referenced in paragraph (a)." Without that second clause, it could be unclear whether contribution and indemnity claims are subject to both the 10-year repose period *and* the two year limitations period (as had been the case under the prior version of the statute). As written, however, the "notwithstanding" and "regardless" clauses leave no doubt that in the cases for which the amendments are effective, the time for bringing contribution and indemnity claims is governed solely by the two-year period defined in subdivision 1(b).

The repose statute defines the time when certain claims accrue and can be timely brought. In no respect does it purport to define or change the elements of a claim. So even if a cause of action has "accrued" and been "brought" within the time period prescribed by § 541.051, a party must still be able to prove all the required elements of its claim to obtain a recovery. As the foregoing discussion and authorities establish, common liability is a required element of contribution claim. *See* discussion above at 12-16. Hence, even if the 2007 amendments apply to determining when URS's contribution claim against Jacobs accrued and could be brought, the absence of common liability precludes a contribution recovery by URS against Jacobs and entitles Jacobs to dismissal as a matter of law.

URS contends that Jacobs' interpretation and that of the court of appeals would render the 2007 amendments a "nullity." URS Br. at 37. This is demonstrably not true, as can be shown through the example of the *Weston* case, which clearly was the impetus for the amendments. The plaintiff's cause of action in that case accrued before the expiration of the repose period, so the absence of common liability was not an issue or a defense. *Weston*, 716 N.W.2d at 636. By the time the defendant commenced its contribution claim, however, the

10 year repose period had expired, so the contribution claim had been extinguished before it was brought and even before it accrued, as accrual was defined under the version of § 541.051 then in effect. *Id.* at 637-39. As a result of the 2007 amendments, however, on the same set of facts, the contribution claim could be timely commenced so long as brought within the two year limitations period provided for in the amendments, even after expiration of the 10-year repose period for direct claims.

URS's contention that amendments to the repose statute eliminated the common liability requirement for contribution claims was addressed and rejected in remarkably similar circumstances by the Iowa Supreme Court. In *Estate of Ryan v. Heritage Trails Assocs., Inc.*, 745 N.W.2d 724 (Iowa 2008), the Iowa repose statute at issue related to product manufacturers and extinguished claims against them fifteen years after a product was purchased or installed. The statute was amended years later to create an exception for contribution and indemnity claims by providing that the statute "shall not affect the time during which a person found liable may seek and obtain contribution and indemnity from another person whose actual fault caused a product to be defective." *Ryan,* 745 N.W.2d at 729 (quoting Iowa Code §614.1(2A)(*a*)). *Ryan* involved an injury occurring 26 years after installation of a chemical tank. The decedent's heirs brought an action against several defendants, who in turn brought claims for contribution against the tank manufacturer.

The Iowa Supreme Court held that the direct defendants' contribution claims against the tank manufacturer were barred because common liability, which, in Iowa, is a necessary element for a successful contribution claim, did not exist. *Ryan*, 745 N.W.2d at 730-31.

According to the court, since the tank manufacturer could not be found liable to plaintiffs for damages, there was no common liability between the tank manufacturer and the direct defendants. *Id.* The court also explicitly rejected the defendants' contention that the later amendments to the statute excepting contribution claims from the repose period eliminated the requirement of common liability. "When the legislature enacted [the amendments], it did not include any language in the statute that leads us to believe the legislature had any intent to modify or repeal the statutory requirements of [common liability]." *Id.* at 731. Thus, while the legislature amended the repose statute had changed the *time* when a party could "seek and obtain contribution," it "did not intend to relieve a party seeking contribution from proving the elements of a contribution claim." *Id.* at 730-31.

Jacobs has never argued, as URS suggests, that *Ryan* is binding precedent on Minnesota courts or that this Court should apply Iowa law. *See* URS Br. at 31. The case illustrates in a persuasive way, however, the distinction and relationship between the time and accrual prescriptions in a statute of repose and the requirement of proving the substantive elements of a claim that are governed by those prescriptions. URS complains that *Ryan* is not persuasive because under Iowa law the requirement of common liability for recovering contribution is imposed by statute rather than the common law. *Id.* This is a distinction without a difference, as the elements of a cause of action are just as requisite when created by common law as by statute. In Iowa, moreover, the statutory rule merely reflects codification of Iowa's common law rule. *See Renner v. Model Laundry, Cleaning & Dying Co.*, 184 N.W. 611, 613 (Iowa 1921). Finally, URS's argument that contribution under Iowa law, unlike Minnesota's rule, is not based on principles of equity is just wrong. *See, e.g.*,

State ex rel. Palmer v. Unisys Corp., 637 N.W.2d 142, 152 (Iowa 2001) ("The doctrine of contribution rests on the equitable principle that the parties subject to common liability should contribute equally to the discharge of that liability."); *City of Cedar Falls v. Cedar Falls Cmty. Sch. Dist.*, 617 N.W.2d 11, 21 (Iowa 2000) ("[c]ontribution is an equitable remedy") (allowing contribution where common liability is based on different legal theories of liability to the plaintiff). Even so, as explained above (*see* discussion above at 16-22, 27-28), this Court has never excused the requirement of common liability—the complete absence of liability to a plaintiff on any theory—on grounds of "equity" or "fairness."

IV. Interpreting the 2007 Amendments to Minn. Stat. § 541.051 to Allow URS's Contribution Claim Against Jacobs Would Violate Jacobs' Constitutional Due Process Rights.

A. A Statute of Repose Creates a Substantive Limit on Liability and a Right of Certainty and Finality in Immunity from Suit.

If URS's contribution claim is not precluded on common law or statutory grounds discussed above, then it is necessary to reach the constitutional ground that entitles Jacobs to dismissal. The due process clauses of both the United States and Minnesota Constitutions protect against deprivations of life, liberty, or property make without due process of law. Minn. Const. art I, § 7; U.S. Const. amend. XIV, § 1. Depriving Jacobs of its right to immunity from suit that had vested prior to the effective date of the 2007 amendments would violate Jacobs' constitutional due process rights. The court of appeals did not reach the constitutional issue as it was unnecessary to do so because of its ruling with respect to the lack of common liability between Jacobs and URS. However, in its separate opinion relating to the claims of the State against Jacobs, the court of appeals held that revival of extinguished claims did not violate due process. *In re Individual 35W Bridge Litig.*, 787 N.W.2d

at 651. *See also U.S. Home Corp. v. Zimmerman Stucco & Plaster, Inc.*, 749 N.W.2d 98 (Minn. Ct. App.), *rev. denied*, Minn. Aug. 5, 2008 (holding that due process not violated where extinguished contribution and indemnity claims revived by 2007 amendments to § 541.051). For the reasons discussed below, the court of appeals' constitutional analysis of this issue is seriously flawed.

In its decisions on the issue, the court of appeals did not give sufficient attention and importance to the substantive right that a party acquires when its repose rights vest upon the expiration of the repose period. In particular, the court of appeals failed to appreciate the significance of the distinction between statutes of repose and statutes of limitations. This Court's decision in *Weston* leaves no doubt that there is, indeed, a significant and constitutionally material distinction between statutes of repose and statutes of limitation. *Weston,* 716 N.W.2d at 641. *See also* discussion above at 14-16.

The importance of the distinction between statutes of repose and statutes of limitation is further illuminated by this Court's precedents on repose statutes and particularly by the way in which these cases have explained the nature and difference between statutes of repose and statutes of limitations. The distinction is a crucial one that this Court described succinctly in *Weston*:

> The constitutional legitimacy of statutes of repose stems from their substantive, rather than procedural, nature: a statute of limitations limits the time within which a party can pursue a remedy (that is, it is a procedural limit), whereas a statute of repose limits the time within which a party can acquire a cause of action (thus it is a substantive limit).

Weston, 716 N.W.2d at 641. The procedural nature of statutes of limitation is such that they destroy a remedy, even though a right to a cause of action has vested. *Id.; see also City of Willmar v. Short-Elliott-Hendrickson*, 512 N.W.2d at 875. In contrast, a statute of repose eliminates the right—the cause of action. *Weston*, 716 N.W.2d at 641.

The substantive-procedural distinction has important consequences when considering whether a law operates retroactively. "It is generally held that legislation dealing *only with remedies and procedures* are not beyond the reach of retrospective legislation." *Peterson v. City of Minneapolis*, 285 Minn. 282, 288, 173 N.W.2d 353, 357 (1969) (emphasis added). Thus:

> In *Donaldson v. Chase Securities Corp.* 216 Minn. 269, 13 N.W.2d 1 (1943), this Court held that the legislature could constitutionally change a statute of limitations. We said that the retroactive change did not violate the due process clause since . . .
>
> '. . . the passage of time creates no vested right in the exemption from the remedy . . . '
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> 'Statutes of limitation which only bar the recovery of a debt or damages for tort are a matter of legislative public policy or expediency and may be changed as legislative wisdom dictates.'[10]

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[10] In *Donaldson*, this Court upheld the validity of a retroactive change in the statute of limitations for claims related to the unlawful sale of securities. The United States Supreme Court affirmed and gave further articulation to the substantive-procedural distinction:

> This Court . . . [has] adopted as a working hypothesis, as a matter of constitutional law, the view that statutes of limitation go to matters of remedy, not to destruction of fundamental rights. The abstract logic of the distinction between substantive rights and remedial or procedural rights may not be clear-cut, but it has been found a workable concept to point up the real and valid difference between rules in which stability is of prime importance and those in which flexibility is a more important value. (Cont.)

Peterson, 285 Minn. at 288, 173 N.W.2d at 357 (quoting *Donaldson*, 216 Minn. at 275, 13 N.W.2d at 4).

The procedural nature of a statute of limitations explains why this Court upheld the retroactive application of a change in the medical malpractice statute of limitations in *Gomon v. Northland Family Physicians*, 645 N.W.2d 413, 417-18 (Minn. 2002) (citing and relying on *Donaldson*); *see also Wichelman v. Messner*, 250 Minn. 88, 107, 83 N.W.2d 800, 817 (1957) (recognizing that the "constitutional prohibitions against retrospective legislation do not apply to statutes of limitation"). Precisely for this reason, however—that statutes of repose do not deal "only with remedies and procedures," *Peterson*, 285 Minn. at 288, 173 N.W.2d at 357, but are instead a "substantive limit" on acquiring a cause of action, *Weston*, 716 N.W.2d at 641—what is permissible in the retroactive application of statutes of limitations is not permissible with respect to statutes of repose. When the repose period ends, the defendant acquires an "immun[ity] from liability." *Id.* (quoting 51 Am. Jur. 2d *Limitations of Actions* § 18 (2000)). So, a substantive limit on an injured person's acquisition of a cause of action is—the other side of the same coin—a substantive right of the defendant to be free from liability. *See Camacho v. Todd & Leiser Homes*, 706 N.W.2d 49, 55 (Minn. 2005) ("Statutes of repose are intended to give finality to the potential defendant and create 'a substantive right in those protected to be free from liability after the legislatively-determined period of time.'") (quoting 54 C.J.S. *Limitations of Actions* § 5 (2005)).

Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945).

B. Jacobs Acquired under Minn. Stat. § 541.051 a Vested Right of Immunity from Suit and Liability, Entitled to Due Process Protection.

The district court in this case held that Jacobs acquired no "vested property interest in the prior repose statute." *Add.05.* As discussed above, the court of appeals reached the same conclusion in its consideration of the State's claim against Jacobs. The conclusion is wrong at several levels. First, the operative event that determines whether a defendant has acquired a right of repose under § 541.051 is simple and straightforward: the passage of a specified number of years after substantial completion of construction. There is no dispute about when that occurred with respect to the Bridge—it happened years, decades before any cause of action arising out of the August 1, 2007, collapse of the Bridge accrued. Once the repose period ended, there was nothing more that needed to occur for Jacobs to acquire its right of immunity. The right did not depend on any contingencies to be determined after the expiration of the repose period. In any ordinary sense of the term, Jacobs' right to repose vested on the expiration of the repose period.

Second, it would be absurd to contend that a right to *repose*—which includes the right to be free from liability and *suit*—vests only *after* a defendant has been put to the burden and expense of litigation all the way through to a non-appealable final judgment. That, however, is the essence of the holding of the district court—that Jacobs has no vested right not to be sued or liable until after it has vindicated that right through to a final judgment. *Add.05.* The district apparently reached this conclusion on the basis of an erroneous view that the *only* way any right can vest in a way that invokes due process protections is after final judgment. *Id.* While it is true that *one* way in which a party acquires vested rights is through entry of a final non-appealable judgment in its favor on an issue, it is clear that that

expiration of a substantive repose period in a party's favor is *another* way in which its rights become vested. *See, e.g., Wichelman v. Messner*, 250 Minn. 88, 106, 83 N.W.2d 800, 816 (1957) ("Retrospective legislation in general . . . will not be allowed to impair rights which are vested and which constitute property rights."). An interpretation that Jacobs has no vested right not to be sued or liable until after it has vindicated that right through to a final judgment is clearly incorrect for these reasons. But it is also demonstrably wrong when viewed in light of this Court's other precedents in the area of vested rights and the retroactive application of laws.

In *Peterson v. City of Minneapolis*, 285 Minn. 282, 173 N.W.2d 353 (1969), this Court stated the rule that "[w]hile courts generally express varying degrees of distaste with retroactive laws, they are usually upheld as long as they do not interfere with Vested legal rights." *Id.* at 287, 173 N.W.2d at 356-57. The Court explained further:

> The term 'vested interests,' when used in the constitutional sense to describe the kind of interest that cannot be impaired by retroactive legislation, reflects a determination that justice and equity require that the interest be preserved.

Id. at 287-88, 173 N.W.2d at 357 (quoting *Halverson v. Rolvaag*, 274 Minn. 273, 275, 143 N.W.2d 239, 241 (1966)). It is immediately after and in the context of the above-quoted statement of the rule with respect to vested rights that the Court went on to explain that "[i]t is generally held that legislation dealing only with remedies and procedures are not beyond the reach of retrospective legislation." *Id.* It then adopted from a law review article three factors to be considered in determining "whether a law may be constitutionally retroactive . . . (1) the nature and strength of the public interest served by the statute; (2) the extent to

which the statute modifies or abrogates the preenactment right; and (3) the nature of the right the statute alters." *Id.* at 288, 173 N.W.2d at 357 ("While these tests are as nebulous as the term itself, they may furnish some guidelines in determining whether the right is one that can be abrogated by legislative act.").

In *Peterson v. City of Minneapolis*, the issue under consideration was whether the legislature's adoption of comparative fault principles in place of contributory negligence, effective for trials commencing after July 1, 1969, could constitutionally be given retroactive effect, *i.e.* applied to causes of action accruing before the effective date. *Id.* at 285, 173 N.W.2d at 356. This Court held that retroactive application was permissible. It noted that the first two factors provided no difficulty because (1) the Court for a number of years had expressed the view that principles of comparative fault were more equitable than contributory negligence; and (2) the old rule of contributory negligence had not been completely eliminated because a plaintiff's recovery would still be reduced by its percentage of comparative fault. *Id.* at 288-89, 173 N.W.2d at 357.

This Court found the third factor to present the "main difficulty" and concluded that "we simply must use our best judgment in determining whether the right is one that has become so fixed that it would be inequitable to abrogate it by retrospective legislation." *Id.* at 289, 173 N.W.2d at 357. It concluded that it was not, noting that the outcome of the change in law would likely have mixed results insofar as some plaintiffs would recover under the new law who would not have recovered previously due to their contributory negligence, but that plaintiffs would also have their recoveries reduced by the amount of their comparative fault. This Court held, therefore, that the retroactive effect of the statute "did

not affect a right which could be considered such a vested right as to prohibit constitutionally any change in it." *Id.* at 290, 173 N.W.2d at 358.

A consideration of the factors identified in *Peterson v. City of Minneapolis* confirms that Jacobs' right of repose acquired under § 541.051 rises to the level of a vested one entitled to protection by constitutional due process. As to the first factor, the question of the nature of the public interest served by the 2007 amendments, remedying the *Weston*-type situation—where a tort occurs within the repose period, but where a general contractor is barred from brining a contribution-indemnity claim because a plaintiff chose to sue late in the repose period—may indeed be a legitimate interest. Moreover, Jacobs does not challenge the wisdom of the legislature's policy change with respect to *prospectively* eliminating the repose period for contribution and indemnity claims.

The interest in reviving long-ago extinguished claims is, however, a different matter. It is utterly irrational for the State to have a decades-old policy which tells parties they have an important interest in being able after a long period of time to "plan their affairs without potential for unknown liability," *Weston*, 716 N.W.2d at 642 (citations omitted)—and then to suddenly both reverse the policy *and* eliminate the settled expectation reasonably acquired and based on the previous policy. *See also Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448, 454 (Minn. 1988) ("the [repose] statute helps avoid litigation and stale claims which could occur many years after an improvement to real property has been designed, manufactured and installed....We hold this objective...should not be lightly disregarded by this court absent a clear abuse.") (footnote omitted).

The second factor—the extent to which the statute modifies or abrogates the preenactment right—is an easy consideration here. The abrogation is total. The right to immunity from suit and liability for those against whom potential liabilities were extinguished prior to the effective date of the 2007 amendments would be completely eviscerated if the 2007 amendments are interpreted to revive claims "indefinitely into the past." The impact, of course, would affect not just Jacobs, but hundreds and likely thousands of other parties who had acquired repose rights prior to the effective date of the 2007 amendments.

The third factor looks to the nature of the right that the State alters. There can be no question that the public policy of granting repose rights after the prescribed period has ended is an important and venerable one. As explained elsewhere, the policy reflects the view that there are good reasons a party should not be exposed to liability indefinitely into the future, long after it has furnished design or construction services, or materials for the construction of an improvement to real property. The policy has been that this right arises the instant that the repose period ends; it is not a contingent one that depends on the trier of fact resolving some other fact issue.

Other courts have recognized that statutes of repose confer substantive rights, and that a legislature may not, through retroactive legislation, revive claims that extinguished under a repose statute. *See, e.g.*, *Farber v. Lok-N-Logs, Inc.* 701 N.W.2d 368, 375 (Neb. 2005); *Ripley v. Tolbert*, 921 P.2d 1210, 1220 (Kan. 1996); *Sch. Bd. of Norfolk v. U.S. Gypsum Co.*, 360 S.E.2d 325, 328 (Va. 1987); *see also Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 869 (Tex. 2009) (interpreting revival statute as applying only to procedural statutes of

limitations, not to statutes of repose, which "create a substantive right to be free from liability after a legislatively determined period"). A few courts have analyzed the issue of vested rights differently, concluding that a legislature may deprive a party of a right of repose so long as it has a "rational basis" for doing so.[11] *See, e.g.*, *Shadburn-Vinton v. Dalkon Shield Claimants Trust*, 60 F.3d 1071 (4th Cir. 1995); *Wesley Theological Seminary of the United Methodist Church v. U.S. Gypsum Co.*, 876 F.2d 119 (D.C. Cir. 1989); *but see Shadburn-Vinton,* at 1078-81 (Widener, J., dissenting). In part, the result in those cases is explained by the fact that the courts did not consider there to be any significant difference between statutes of repose and statutes of limitations. As discussed above, this Court has consistently differentiated the two types of statutes in a way that has important, constitutional significance. Moreover, as the three-factor analysis in *Peterson v. City of Minneapolis* demonstrates, the question in this Court of whether a vested right is entitled to constitutional due process protection does not come down merely to whether the legislature had a rational basis for taking the right away.

Finally, while this Court's vested rights analysis has not employed the rational basis test, application of the 2007 amendments to URS's claims against Jacobs would fail even that test because for the reasons discussed above, to the extent they are interpreted to revive claims "indefinitely into the past," their application is completely unreasonable. *See, e.g.*,

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[11] A United States District Court in Minnesota similarly applied the rational-basis test in considering whether the legislature could validly revive certain asbestos property damage claims. *See Indep. Sch. Dist. No. 197 v. W.R. Grace & Co.*, 752 F. Supp. 286, 296-99 (D. Minn. 1990) (cited in *Larson v. Babcock & Wilcox*, 525 N.W.2d 589, 591-92 (Minn. Ct. App. 1994)). This portion of the court's decision was dictum, however, because the court earlier determined in its opinion that allegations of fraud precluded application of the repose period to extinguish claims under § 541.051. *See W.R. Grace & Co.*, 752 F. Supp. at 289-292. Moreover, the court explicitly rejected the significance of the substance-procedure distinction between statues of repose and limitations that this Court has given recognition to.

Woodhall v. State, 738 N.W.2d 357, 363 (Minn. 2007) ("A statute does not comport with due process when it is arbitrary or unreasonable.").

Conclusion

For all the foregoing reasons, the decision of the court of appeals should be affirmed.

Dated: January 18, 2011.

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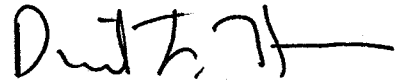
By 

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CERTIFICATE OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. By automatic word count, the length of this brief is 16,137 words. This brief was prepared using Microsoft Word 2003.

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